



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

May 29, 2003

Mr. James L. Hall  
Assistant General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342-4004

OR2003-3622

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181851.

The Texas Department of Criminal Justice (the "department") received a request for information relating to communications involving a former employee of the department and the law firm of Shellist, Lore & Lazarz, Ltd. You inform us that some of the requested information either has been or will be released. You claim that the remaining requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.<sup>1</sup>

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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<sup>1</sup>We also received your letter dated May 9, 2003, in which you withdrew your request for a decision with regard to the documents that are attached to that letter. This decision is not applicable to those documents.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the information that you claim is excepted from disclosure under section 552.103 of the Government Code includes completed evaluations made of, for, or by the department. You must release the completed evaluations under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. You do not raise section 552.108. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception may be waived). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022. Therefore, the department may not withhold the completed evaluations under section 552.103. We have marked the information that is subject to section 552.022(a)(1).

We note, however, that the marked evaluations contain the social security number of a former employee of the department. Section 552.117(1) of the Government Code excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(1) must be determined at the time that the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the department received the request for information. The department may not withhold information under section 552.117(1) for a current or former employee who did not make a timely election to keep the information confidential. Thus, the social security number contained in the submitted evaluations is excepted from disclosure under section 552.117(1) if the former employee to whom the social security number pertains made a timely election under section 552.024 to keep his social security number confidential. We have marked the information that the department may be required to withhold.

The social security number in question also may be excepted from disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number pursuant to any provision of law enacted

on or after October 1, 1990.<sup>2</sup> See Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number contained in the submitted evaluations is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that authorizes the department to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security number in question was obtained or is maintained pursuant to such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. See Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the department should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Next, we consider whether you may withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

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<sup>2</sup>Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential.

You state that the remaining information for which you claim an exception under section 552.103 relates to a pending criminal case. You do not inform us, however, that the department is a party to the criminal case. Thus, the department may not withhold the information at issue under section 552.103 on the basis of its relationship to the criminal case. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990).<sup>3</sup> You also inform us, however, and have provided documentation demonstrating, that the information at issue relates to a pending civil lawsuit to which the department is a party. The submitted documentation also reflects that the civil litigation was pending when the department received this request for information. Therefore, based on your representations, the submitted documentation, and our review of the information at issue, we conclude that section 552.103 is applicable in this instance.

We note, however, that the information in question includes correspondence with an attorney for the opposing parties. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing parties have seen or had access to information relating to anticipated or pending litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that the opposing parties to the litigation have seen, or to which they have already had access, may not now be withheld under section 552.103. Otherwise, except for the evaluations that are subject to section 552.022, you may withhold the information that relates to the pending civil lawsuit under section 552.103. We note that section 552.103 is no longer applicable to that information once the related civil litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that the rest of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity

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<sup>3</sup>When a governmental body seeks to withhold information under section 552.103 on the basis of criminal litigation to which it is not a present or prospective party, we require an affirmative representation from the prosecuting attorney representing the governmental body that is a party to the litigation that he or she wants the information in question withheld under section 552.103. You do not inform us that the prosecutor in the criminal case has requested that information relating to the case be withheld under section 552.103.

other than that of providing or facilitating professional legal services to the client governmental body. See *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. See TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. See *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. See *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that the information for which you claim an exception under section 552.107(1) consists of internal communications. You also inform us that the parties to these communications include attorneys for and client representatives of the department. You indicate that the department has maintained the confidentiality of these communications. Based on your representations and our review of the information that you seek to withhold, we conclude that you have demonstrated that section 552.107(1) is applicable to that information. Therefore, you may withhold the information at Tabs 1, 2, 3 and 4 under section 552.107 of the Government Code.

In summary, the information that is subject to section 552.022(a)(1) of the Government Code includes a social security number that the department may be required to withhold under section 552.117(1). The social security number also may be excepted from disclosure under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The department may withhold the rest of the submitted information that relates to the pending civil litigation under section 552.103, except for any information that the opposing parties to the litigation have seen or to which they have had access. The information at Tabs 1, 2, 3, and 4 is excepted from disclosure under section 552.107. The department must release the rest of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

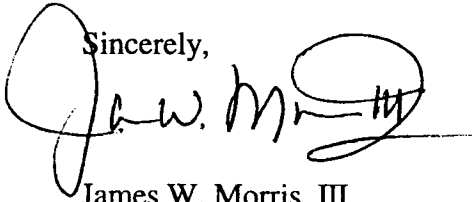
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large loop at the beginning and a distinct "III" at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 181851

Enc: Submitted documents

c: Mr. David P. O'Neil  
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(w/o enclosures)